STATE OF MICHIGAN

COURT OF APPEALS

ROBERT KELLER,

Plaintiff-Appellee,

v

CLEARING NIAGARA CORPORATION, a/k/a CLEARING NIAGARA, INC., and APHASE II, INC.,

Defendants,

and

PNEUMATIC TECHNOLOGY, INC.,

Defendant-Appellant,

and

HUMPHREY, INC.,

Defendant.

UNPUBLISHED
September 16, 2003

No. 237964
Macomb Circuit Court
LC No. 00-003537-NP

ROBERT WILLIAM KELLER,

Plaintiff-Appellee,

v

CLEARING NIAGARA CORPORATION, a/k/a CLEARING NIAGARA, INC., PNEUMATIC TECHNOLOGY, INC., and HUMPHREY, INC.,

Defendants,

and

APHASE II, INC.,

No. 239130
Macomb Circuit Court
LC No. 00-003537-NP

Defendant-Appellant.

ROBERT WILLIAM KELLER,

Plaintiff-Appellee,

v

CLEARING NIAGARA CORPORATION, a/k/a CLEARING NIAGARA, INC., APHASE II, INC., and PNEUMATIC TECHNOLOGY, INC.,

Defendants,

and

HUMPHREY, INC.,

Defendant-Appellant.

No. 239139
Macomb Circuit Court
LC No. 00-003537-NP

ROBERT WILLIAM KELLER,

Plaintiff-Appellee,

v

CLEARING NIAGARA CORPORATION, a/k/a CLEARING NIAGARA, INC., APHASE II, INC., and PNEUMATIC TECHNOLOGY, INC.,

Defendants,

and

HUMPHREY, INC.,

Defendant-Appellant.

No. 239140
Macomb Circuit Court
LC No. 00-003537-NP

Before: Judge Zahra, P.J., and Talbot and Owens, J.J.

PER CURIAM.

Plaintiff lost his left hand while operating a mechanical press at Aphase II, Inc. Plaintiff filed a complaint against his employer, Aphase, and against defendants Humphrey, Inc., and Pneumatic Technology, Inc. (PTI), the manufacturer and the seller, respectively, of the two palm buttons that were part of the dual palm system that Aphase designed and installed on the mechanical press.[1] The trial court denied the separate motions for summary disposition that were filed by defendants. We granted leave to appeal from the denial of summary disposition to address (1) whether the facts alleged by plaintiff are sufficient as a matter of law to state a question for the jury regarding his employer's liability within the intentional tort exception of the Worker's Disability Compensation Act and (2) whether plaintiff's claims against the manufacturer and seller of the palm buttons that operated the press were barred by the sophisticated user doctrine or the component parts theory. We conclude that plaintiff failed to present evidence to establish that the alleged defect caused his injury. The evidence failed to establish that Aphase had actual knowledge that an injury was certain to occur to satisfy the intentional tort exception of the Worker's Disability Compensation Act. As to Humphrey and PTI, we conclude that plaintiff did not show a prime facie products liability claim. Accordingly, we reverse.

I. Standard of Review

"This Court reviews the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law." *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). This Court must review the record in the same manner as must the trial court to determine whether the movant was entitled to judgment as a matter of law. *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998). In deciding a motion for summary disposition under MCR 2.116(C)(10), the court considers "affidavits, pleadings, depositions, admissions, and documentary evidence" submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the nonmoving party. If the evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10); *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Questions of law are reviewed de novo. *Cardinal Mooney High School v Michigan High School Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991).

III. Analysis

A. Docket No. 239130

In Docket No. 239130, Aphase argues that the intentional tort exception to the exclusive remedy provision of the Worker's Disability Compensation Act, MCL 418.131(1) bars plaintiff's claim because plaintiff failed to prove that Aphase had actual knowledge that an injury was certain to occur. We agree.

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[1] Plaintiff also filed a claim against Clearing Niagara Corporation, the manufacturer of the mechanical press involved in the accident. The claim was dismissed with prejudice before the trial court ruled on the motions for summary disposition in this case, and it is not part of this appeal.

Worker's compensation is "the exclusive remedy for all on-the-job injuries, except for injuries intentionally inflicted by the employer." *Gray v Morley (After Remand)*, 460 Mich 738, 741; 596 NW2d 922 (1999). MCL 418.131(1) of the Worker's Compensation Act requires a plaintiff to present evidence that "the employer specifically intended an injury, or, in lieu of such evidence, sufficient proof that the employer had actual knowledge that injury was *certain* to occur." *Gray, supra* at 745 (emphasis in original). Although the determination whether the facts alleged by plaintiff are true is one for the fact finder, it is a question for the court to determine whether the facts alleged are sufficient to constitute an intentional tort within the meaning of the act. *Palazzola v Karmazin Products Corp*, 223 Mich App 141, 146-147; 565 NW2d 868 (1997). "[W]hen there is no direct evidence of intent to injure . . . intent must be proved with circumstantial evidence." *Travis v Dreis & Krump Mfg Co*, 453 Mich 149, 173; 551 NW2d 132 (1996). The employer's intent to injure may be inferred if the employer "had actual knowledge that an injury was certain to occur, under circumstances indicating deliberate disregard of that knowledge." *Id*. at 180.

In this case, there was no evidence of a specifically intended injury to plaintiff. Therefore, the trial court correctly ruled that plaintiff was required to show through circumstantial evidence that Aphase had actual knowledge that an injury was certain to occur from the manner in which the mechanical press malfunctioned in this case. As the trial court noted, it was undisputed that plaintiff was required to prove that Aphase subjected him to a continuously operating dangerous condition. "When an employer subjects an employee to a continuously operative dangerous condition that it knows will cause an injury, yet refrains from informing the employee about the dangerous condition so that he is unable to take steps to keep from being injured, a factfinder may conclude that the employer had knowledge that an injury is certain to occur." *Travis, supra* at 178. Actual knowledge precludes liability based upon implied, imputed, or constructive knowledge. Actual knowledge for a corporate employer can be established by showing that a supervisory or managerial employee had "actual knowledge that an injury would follow from what the employer deliberately did or did not do." *Palazzola, supra* at 149, citing *Travis, supra* at 173-174.

Viewed in the light most favorable to plaintiff, the evidence showed that Aphase was a small family-owned business that manufactures prototype stamping and injection molds for the automotive industry. Aphase owned several hydraulic presses and the mechanical press at issue. Aphase's new production manager, Stephen Berkley, believed that the mechanical press was unsafe because it was operated by a foot pedal and he decided to install a dual palm button operating system. Under this system, the press would not operate unless both of the operator's hands pressed the palm buttons simultaneously. This would ensure that the operator would not mistakenly place his hand under the press pinch point at the time of activation.

One of Aphase's employees, Noel Noble, designed the dual palm button system. Noble purchased from PTI, a distributor of critical safety devices, items needed for the system, including two palm buttons manufactured by Humphrey. Aphase installed the system on its press in August, 1997. Shortly afterward, plaintiff, who had been working with Aphase for only a few months, was introduced to the operation of the press. Plaintiff's supervisor, William Bluthardt, showed him how to operate the press. Bluthardt instructed plaintiff to press the palm buttons simultaneously, step back from the press and wait about ten seconds after the press descended and ascended, completing a cycle, before reaching into the press' pinch point to

retrieve the part. Bluthardt demonstrated the procedure by inserting his own hand under the pinch point.

On the morning of August 25, 1997, plaintiff made several parts on the mechanical press. After lunch, he made one or two parts. He then made another part by pressing the dual palm buttons once, operating one full cycle. Plaintiff waited "more than ten seconds" after the cycle was complete before he placed his hand in the pinch point area of the press to retrieve the metalwork. However, the ram of the press suddenly descended or "bottomed," and shattered plaintiff's left hand. The ram did not ascend to complete a normal cycle. About ten seconds later, plaintiff pressed the power button and shut off the press. The ram was manually lifted off plaintiff's hand, which was subsequently amputated.

Two Michigan Consumer Industry Service investigators who tested the press a few days later discovered that the dual palm button system was installed in a manner that violated numerous regulations under the Michigan Occupational Safety and Health Act (MIOSHA), MCL 408.1001, *et seq*, foremost of which were that (1) the press lacked a single-stroke safety device that would prevent a recycle not ordered by the operator, and (2) the dual palm button system was installed only thirteen inches away from the pinch point when the MIOSHA regulations called for a sixty-inch distance. Although the purpose of the investigation was not to determine the cause of the press' malfunction or to reconstruct the accident, the investigators discovered that the press would recycle on its own when first turned on and when the dual palm buttons were pressed continuously. The two investigators were unable to reproduce the incident where the ram descended or "bottomed" in the manner it did in the accident.

From the above, plaintiff presented sufficient evidence to establish that Aphase had actual knowledge that the press would recycle without operator input under only two circumstances: (1) immediately upon the press being turned on and (2) when the operator pressed the dual palm buttons continuously. However, plaintiff was not injured under either of these two circumstances. Even plaintiff's own liability expert testified that this was not "a classic cycle" and he could not explain why the press "bottomed" or why there was more than a ten-second delay between the first full cycle and the second half cycle that shattered plaintiff's hand. He only testified that there were a variety of reasons under which the press could have "bottomed." Further, while plaintiff presented sufficient evidence to show that the installation of a single-stroke safety device may have prevented the recycling under the above two circumstances, he failed to provide any evidence showing that a single-stroke safety device or placing the dual palm button system sixty inches from the pinch point of the press would have prevented the ram from malfunctioning in the manner it did. In other words, the record establishes that, while the parties were engaged in attempting to prove or disprove Aphase's knowledge of the "recycling" nature of the press, little attention was afforded to whether Aphase's actually knew that an injury was certain to occur from the ram descending and stopping mid-stroke. Nor did the evidence establish a link between the recycling that occurred when the press was first turned on or when the palm buttons were continuously depressed, and what occurred here, where there was no evidence that the press had just been turned on and plaintiff expressly denied that he was pressing the buttons continuously.

Plaintiff asserts that his supervisor, William Bluthardt, instructed him to place his hand in the die area of the machine to retrieve the metal parts. It is undisputed that Aphase's managers and owners were fully aware of the danger of loss of limb and life by placing hands in the die

area underneath the press ram. Nonetheless, an employer's knowledge of general risks is insufficient to establish actual knowledge. *Agee v Ford Motor Co*, 208 Mich App 363, 367-368; 528 NW2d 768 (1995). It is also undisputed that such instruction constituted negligence on the part of Aphase. However, section 131(1) of the Worker's Compensation Act, MCL 418.131(1), expressly recognizes a distinct difference between gross negligence and an actual intent to injure. *Gray, supra* at 744. Accordingly, plaintiff failed to satisfy the first element required by section 131(1).

The evidence in this case also failed to establish an "injury certain to occur." An injury is certain to occur if there is no doubt that it will occur. *Travis, supra* at 174. The element of an "injury certain to occur" is an "extremely high standard" of proof that cannot be met by reliance on the laws of probability, the mere prior occurrence of a similar event, or conclusory statements of experts. An employer's awareness that a dangerous condition exists is not enough. Instead, an employer must be aware that injury is certain to result from what the actor does. *Palazzola, supra* at 150. In this case, there was nothing to establish that the ram ever descended on its own and stopped mid-stroke before the accident. The evidence showed no previous injury or malfunction at any time during the twenty or so years in which Aphase owned and operated the press that would point to knowledge that an injury was "certain to occur." Plaintiff's supervisor, Bluthardt, was the main person who operated the press. Bluthardt testified that he never had a problem operating the press. Accordingly, the evidence failed to establish the second element required by section 131(1). Because the evidence was insufficient to prove that Aphase had actual knowledge that an injury was certain to occur, there is nothing to show "deliberate disregard of that knowledge." Thus the trial court erred in denying Aphase's motion for summary disposition.

B. Docket Nos. 237964, 239139 and 239140

In Docket Nos. 237964, 239139 and 239140, Humphrey and PTI, the manufacturer and the seller of the two palm buttons that Aphase used in building the dual palm button system on the press, argue that plaintiff's claims against them are barred by the sophisticated user doctrine and the component parts theory.

MCL 600.2945 of the products liability statute defines a "products liability action" as:

> . . . an action based on any legal or equitable theory of liability brought for or on account of death or injury to person or property caused by or resulting from the manufacture, construction, design, formula, development of standards, preparation, processing, assembly, inspection, testing, listing, certifying, warning, instructing, marketing, advertising, packaging, or labeling of a product or a component of a product.

In this case, plaintiff alleged that the palm buttons were defective because of the failure to warn of the inherent danger of misuse. However, a manufacturer is relieved of a duty to warn under the sophisticated user doctrine of the inherent dangers associated with the product if the purchaser is a sophisticated user because a sophisticated user is charged with knowledge of the product. MCL 600.2945(j), 2947(4); *Portelli v I R Construction Products Co, Inc,* 218 Mich App 591, 601; 554 NW2d 591 (1996). Similarly, a manufacturer would be relieved of the duty to warn under the component parts theory if three requirements are met: (1) the component is

part of a good rather than simply a piece in the collection of goods, (2) the component part is not dangerous in and of itself, and (3) there is a lack of foreseeability as to how the component part would be fabricated into the complete unit. *Id*. at 603-604; *Villar v E Bliss Co*, 134 Mich App 116, 120-121; 350 NW2d 920 (1984). We conclude that we need not address these legal theories because plaintiff failed to present evidence from which a reasonable inference may be made that the alleged defect in Humphrey's palm buttons caused plaintiff's injury.

"It is well settled under Michigan law that a prima facie case for products liability requires proof of a casual connection between an established defect and injury." *Skinner v Square D Co*, 445 Mich 153, 159; 516 NW2d 475 (1994). Specifically, a plaintiff must show that "the manufacturer's negligence was the *proximate* cause of the plaintiff's injuries." *Id*. at 162 (emphasis in original). To prove proximate cause, plaintiff must prove (1) cause in fact, and (2) legal cause or "proximate cause." *Id*. at 162-163. "The cause in fact element generally requires showing that 'but for' the defendant's actions, the plaintiff's injury would not have occurred." *Id*. at 163 (citation omitted). "Legal cause" examines the foreseeability of consequences. *Id*.

It is undisputed that Aphase violated numerous MIOSHA rules and regulations in the manner in which it installed the dual palm button system into the press. However, nothing was presented to establish that, had Humphrey and PTI properly warned Aphase to install the system in accordance with MIOSHA regulations and warned Aphase to install a single-stroke safety device, the accident was not likely to have occurred.

With respect to PTI, in Docket No. 237964, the record shows that, at the time the trial court denied PTI summary disposition, plaintiff had failed to produce the testimony of any products liability expert to show the existence of a genuine issue of material fact, even though plaintiff's products liability expert, Gerald Rennell, had been deposed at the time. With respect to the claims against Humphrey in Docket Nos. 239139 and 239140, the record shows that plaintiff supported his opposition to summary disposition with a portion from Rennell's testimony on the standard industry practice to provide warnings with palm buttons. Plaintiff also had another products liability expert in this case, Vaughn Adams, who was deposed after Humphrey moved for summary disposition. Plaintiff did not filed Adams' deposition transcript in the lower court, but Aphase addended the transcript to its supplemental brief in support of summary disposition. As previously discussed in the first issue in this opinion, Adams' testimony failed to establish the causation element in this case. Nowhere in this record did plaintiff establish that the lack of warning caused his injury.

Because plaintiff was unsuccessful in showing a genuine issue of factual causation, we need not address the legal cause, or "proximate cause. *Skinner, supra*. Accordingly, plaintiff's claims against Humphrey and PTI fail as a matter of law. Therefore, the trial court erred in denying their motions for summary disposition.

Reversed.

/s/ Brian K. Zahra
/s/ Michael J. Talbot
/s/ Donald S. Owens